

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CARLTON BURTON
Claimant

VS.

LABOR READY, INC.
Respondent
Self-Insured

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Docket No. 225,093

ORDER

Claimant appeals the May 31, 2000, Award of Administrative Law Judge Brad E. Avery. Claimant was awarded a 2.5 percent permanent partial disability to the body as a whole, against which respondent was granted a credit for its overpayment of temporary total disability benefits. Oral argument to the Board was held on November 3, 2000.

APPEARANCES

Claimant appeared by his attorney, Roger D. Fincher of Topeka, Kansas. Respondent appeared by its attorney, Michael H. Stang of Overland Park, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

RECORD

The record contained in the Award of the Administrative Law Judge was considered by the Appeals Board. In addition, the parties agree that the preliminary hearing transcript dated October 1, 1997, was to be included in the record. However, any exhibits to that preliminary hearing are excluded. Additionally, it was stipulated at regular hearing that the discovery deposition of claimant taken June 2, 1998, is a part of the record.

STIPULATIONS

The Appeals Board adopts the stipulations contained in the Award of the Administrative Law Judge.

ISSUES

- (1) What is the nature and extent of claimant's injury and/or disability?
- (2) How much temporary total disability compensation is claimant entitled to under the Award?
- (3) Is respondent entitled to a credit for any overpayment of temporary total disability compensation in this matter?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record filed herein, the Appeals Board finds that the Award of the Administrative Law Judge should be affirmed.

Claimant suffered accidental injury on May 7, 1997, when he was involved in an automobile accident on his way to Lawrence, Kansas. While the accident resulted in some medical treatment being provided to claimant, the disability was relatively minor. Claimant was released to light duty by his treating physician on May 13, 1997. Claimant was working part time for respondent Labor Ready. He was at the time of the accident also working full time for Southwest Caging, earning \$6 an hour, 40 hours per week. For reasons unexplained in the record, claimant did not return to work at Southwest Caging, even though the employment duties there, claimant acknowledged, were within his temporary restrictions. Several days later on May 17, 1997, claimant was fired at Southwest Caging for failing to return to work.

The record is confusing regarding what, if any, efforts claimant made to obtain employment. Claimant testified he returned to respondent in an attempt to obtain additional employment after the automobile accident. In one place, claimant testified that, when he returned to respondent, they had no work for him because of his restrictions. At another time in his testimony, claimant said that, after his accident, respondent sent him to E & E in Lawrence, Kansas, the company he was working for through Labor Ready at the time of the original May 1997 accident, a couple of times. In yet another place in the transcript, claimant testified he worked for E & E after the 1997 accident for three to four

weeks. Claimant also testified that he worked for one or two other employers between May 1997 and August 1998.

The Administrative Law Judge concluded that claimant's failure to return to full-time employment was more likely due to claimant's unwillingness to work, rather than his May 7, 1997, work-related injury. The Appeals Board agrees. The record indicates that, after the May 1997 accident, claimant was physically capable of returning to work and, in fact, had a full-time job available within his restrictions. It was only claimant's failure to return to Southwest Caging which caused him to lose that job.

The Appeals Board affirms the Administrative Law Judge's finding that claimant failed to put forth a good faith effort to find work, post injury. Based upon Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997), claimant would be limited to his functional impairment. The record shows claimant could have returned to work at a comparable wage at Southwest Caging had he simply gone back to work.

The Administrative Law Judge went on to award claimant a 2.5 percent permanent partial disability based upon the functional impairment opinion of Peter V. Bieri, M.D., the court appointed independent medical examiner. Dr. Bieri assessed claimant a 5 percent whole person impairment based upon the AMA Guides to the Evaluation of Permanent Impairment, and then opined that 2.5 percent of that preexisted his May 1997 accident. Dr. Bieri found it significant that claimant had been involved in an accident in 1994 while working for Hallmark. As a result of that low back injury, he was paid temporary total disability compensation, was provided medical benefits and received a lump sum settlement. Dr. Bieri opined that claimant's lumbar spine injury, at that time, resulted in some persistent pathology which he placed at 2.5 percent impairment to the body as a whole. The Appeals Board finds, pursuant to K.S.A. 1996 Supp. 44-501, claimant's preexisting functional impairment should be deducted from the 5 percent whole person impairment assessed claimant by Dr. Bieri for the 1997 accident, with the resulting disability being a 2.5 percent permanent partial impairment to the body as a whole.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Brad E. Avery dated May 31, 2000, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of November 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Roger D. Fincher, Topeka, KS
Michael H. Stang, Overland Park, KS
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Director